Findings of Fact and Conclusions of Law with Nonfinal Order" by the Administrative Law Judge in *Lee E. Gross Revocable Trust, et al., v. Department of Natural Resources and Howard*, Administrative Cause No. 13-100W

- Nonfinal Order of Partial Summary Judgment on Remand, dated June 10, 2014
- Respondent Howards' Objection to Nonfinal Order of Partial Summary Judgment on Remand, filed June 27, 2014
- Claimants' Response to Respondents' Objection to Nonfinal order, filed August 18, 2014

BEFORE THE
NATURAL RESOURCES COMMISSION
OF THE
STATE OF INDIANA

IN THE MATTER OF:

LEE E. GROSS REVOCABLE TRUST, CHAD D. LARSH, MICHELLE M. LARSH and MARVIN D. LARSH, **Claimants,**	)	**Administrative Cause Number: 13-100W**
vs.	)	
INDIANA DEPARTMENT OF NATURAL RESOURCES, LARRY J. HOWARD and BERNADEAN M. HOWARD, **Respondents.**	)	**(CTS-3553 – PL-21572)**

NONFINAL ORDER OF PARTIAL SUMMARY JUDGMENT ON REMAND

[1] This proceeding arises on remand from a Final Order of Partial Summary Judgment by the Natural Resources Commission (the "Commission") in *Howard v. DNR and Smith*, Administrative Cause No. 10-206W, 13 Caddnar 36 (2012) (referenced here as "*Howard v. DNR*"). Chad D. Larsh, Paul J. Smith, Gail L. Smith, Lee E. Gross, Daniel Jones, Jennifer Jones, Thomas E. Warren, and Daniel L. Warren petitioned for judicial review from the Kosciusko Circuit Court in Cause No. 43C01-1204-MI-44. The Kosciusko Circuit Court entered an Order on July 2, 2012 granting a motion to dismiss the petition for judicial review. An appeal from the Order of the Kosciusko Circuit Court was not taken. The Commission's Final Order of Partial Summary Judgment controls. As posted at 13 Caddnar 36, *Howard v. DNR*, with the order of the Final Order and the Findings reversed, provides in substantive parts:

FINDINGS

A. Statement of the Case and Jurisdiction

1. On December 2, 2010, Larry J. Howard and Bernadean M. Howard (collectively the "Howards") petitioned the Natural Resources Commission (the "Commission") for relief, under Ind. Code § 4-21.5 (sometimes referred to as the "Administrative Orders and Procedures Act" or "AOPA"), and under procedural rules the Commission adopted at 312 Ind. Admin. Code § 3-1.

2. The petition referenced in Finding 1 was directed to an initial determination by the Department of Natural Resources (the "DNR") to deny a permit sought by the Howards, under IC § 14-26-2 (sometimes referred to as the "Lakes Preservation Act") and 312 IAC § 11, for the placement of a pier at a site adjacent to the First Addition to Valentines Subdivision on Yellow Creek Lake and within Yellow Creek Lake in Kosciusko County, Indiana (the "subject permit"). DNR enumerated the application for the subject permit as PL-21572. Yellow Creek Lake is a "public freshwater lake" as defined by IC § 14-26-2-3 and 312 IAC § 11-2-17.[a] In addition to AOPA, the Lakes Preservation Act is governed by procedures in IC § 14-11-4.

3. The Commission is the "ultimate authority" under AOPA for DNR determinations under the Lakes Preservation Act and 312 IAC § 11. IC § 14-10-2-3. These include determinations pertaining to riparian rights and permitting for the placement of piers. *Lukis v. Ray*, 888 N.E.2d 325 (Ind. App. 2008).

4. The DNR denied the subject permit on November 24, 2010 for the following reasons:

(1) failure to notify at least one (1) of the owners of each parcel of real property reasonably known to be adjacent to the affected real property as required by IC 14-11-4-5
(2) failure to prove that access to the easement on Outlot 4 is exclusive and not shared; if access rights are shared with other lot owners in Valentine's Subdivision, then those lot owners should have been provided public notice as well

5. On December 6, 2010, the Commission assigned Stephen L. Lucas as administrative law judge for Administrative Cause Number 10-206W ("the proceeding"). A "Notice of Initial Prehearing Conference" was served upon the Howards and the DNR. The initial prehearing conference was conducted by telephone on January 21, 2011.

6. On December 10, 2010, Eric L. Wyndham and Ihor N. Boyko filed their "Joint Appearance of Counsel for Respondent Department of Natural Resources".

7. On February 1, 2011, Stephen R. Snyder entered an "Appearance" and a "Motion to Intervene" on behalf of Paul J. Smith, Gail L. Smith, Lee E. Gross, Chad D. Larsh, Daniel Jones, and Jennifer Jones. On February 7, Snyder entered an "Appearance" and a "Motion to Intervene" on behalf of Thomas E. Warren and Diana L. Warren.

8. On February 15, 2011, Robert W. Eherenman and Melanie L. Farr filed their joint "Appearance" for the Howards.

9. Also on February 15, the administrative law judge granted the "Motion to Intervene" of Paul J. Smith, Gail L. Smith, Lee E. Gross, Chad D. Larsh, Daniel Jones, and Jennifer Jones. On March 8, he granted the "Motion to Intervene" of Thomas E. Warren and Diana L. Warren. No party objected to either "Motion to Intervene". Paul J. Smith, Gail L. Smith, Lee E. Gross, Chad D. Larsh, Daniel Jones, Jennifer Jones, Thomas E. Warren, and Diana L. Warren are collectively the "Respondent Intervenors".

10. To address the DNR's denial of the subject permit because of the Howards' stated "failure to notify at least one (1) of the owners of each parcel of real property reasonably known to be adjacent to the affected real property as required by IC 14-11-4-5", the Howards' attorneys developed a list of list of property owners for the "various Plats for the Valentine Additions". Consistent with the terms of a "Report of Telephone Status Conference and Notice of Status Conference" (March 8, 2011), the list was distributed for comment to the attorneys for the DNR and for the Respondent Intervenors. The attorney for the DNR did not comment, and the attorney for the Respondent Intervenors approved the list. The list of potentially affected persons was then filed with the Commission. Eherenman email (March 31, 2011).

11. From the list referenced in Finding 10 for persons who were not already parties, the administrative law judge identified "Third Party Respondents" and issued an "Order to Add and Notice to Third Party Respondents" on April 1, 2011. Copies of the Order were sent to the Howards, the DNR, the Respondent Intervenors, and the Third Party Respondents. The Order described the proceeding and informed the Third Party Respondents they could assert an interest in the rights being adjudicated either by filing a written statement with the administrative law judge by April 22, 2011 or by participating in a status conference scheduled for April 28, 2011.

12. The Howards, the DNR, the Respondent Intervenors, and the Third Party Respondents are collectively the "Parties".

13. None of the Third Party Respondents filed a written statement with the administrative law judge, and none of the Third Party Respondents participated in the status conference held on April 28, 2011.

14. On May 27, 2011, the Howards filed a "Motion for Default Judgment against Third Party Respondents" based on their failure to respond to the "Order to Add and Notice to Third Party Respondents".

15. Following receipt of the "Motion for Default Judgment against Third Party Respondents", the administrative law judge entered a "Notice of Proposed Defaults" on June 15, 2011 against "each and every one of the Third Party Respondents" listed in the entry. Each of the Third Party Respondents was additionally provided "until June 29, 2011 to file a written motion requesting that the proposed default not be imposed and stating grounds relied upon for the request." They were informed that if "no appropriate motion is filed, the administrative law judge would conduct any other action needed to complete the proceeding" and that a final order of default would be entered against the Third Party Respondents.

16. No Party filed a response to the "Notice of Proposed Defaults" entered on June 15, 2011.

17. On July 7, 2011, the Commission entered a "Final Order of Default against Third Party Respondents" that applied to each of them. The Final Order stated any "person who wishes to seek judicial review must file a petition in an appropriate court within 30 days of the order and must otherwise comply with IC 4-21.5-5. Service of a petition for judicial review is also governed by 312 IAC 3-1-18." The Commission is among entities required under IC § 4-21.5-5-7(b) and 312 IAC § 3-1-18 to be notified if a petition for judicial review is filed, but the Commission has since received no notification of a petition for judicial review.

18. The Commission has jurisdiction over the Parties and over the subject matter of the proceeding. Following entry of the "Final Order of Default against Third Party Respondents", the Commission may appropriately conduct all action necessary to complete the proceeding in their absence.

B. Standards for Summary Judgment

19. On August 18, 2011, the administrative law judge entered an "Order Approving Parties' Agreed Schedule for Summary Motions and Notice of Rescheduled Telephone Status Conference".

20. Based upon the Claimants' request and the agreement of the DNR and the Respondent Intervenors, the "Order Approving Parties' Agreed Schedule for Summary Motions and Notice of Rescheduled Telephone Status Conference" was amended on October 6, 2011 to read as follows:

A. The Claimants shall file and serve their motion for summary judgment by October 17, 2011.
B. The [DNR] and the Respondent Intervenors shall file and serve any response to the motion for summary judgment, and any cross-motion for summary judgment, by November 21, 2011.
C. The Claimants shall file and serve any reply to a response, as well as any response to a cross-motion for summary judgment, by December 30, 2011.

21. On October 17, 2011, the "Claimants' Motion for Summary Judgment" and the "Claimants' Brief in Support of Motion for Summary Judgment" were timely filed.

22. On November 21, 2011, the Respondent Intervenors timely filed their "Response to Claimants' Motion for Summary Judgment and Cross-Motion for Summary Judgment" and their "Memorandum in Opposition to Claimants' Motion for Summary Judgment and in Support of Respondent Intervenors' Cross-Motion for Summary Judgment".

23. On December 19, 2011, the "Claimants' Response to Respondent Interveners' Cross-Motion for Summary Judgment and Reply in Support of Claimants' Motion for Summary Judgment" was timely filed.

24. The DNR elected not to file any pleading or document pertaining to the agreed schedule ordered for summary judgment. As a result, the DNR has waived any opportunity under Finding 20 for filing pertaining to summary judgment.

25. IC § 4-21.5-3-23 governs summary judgment under AOPA and provides:

> (a) A party may, at any time after a matter is assigned to an administrative law judge, move for a summary judgment in the party's favor as to all or any part of the issues in a proceeding.
> (b) Except as otherwise provided in this section, an administrative law judge shall consider a motion filed under subsection (a) as would a court that is considering a motion for summary judgment filed under Trial Rule 56 of the Indiana Rules of Trial Procedure.
> (c) Service of the motion and any response to the motion, including supporting affidavits, shall be performed as provided in this article.
> (d) [IC § 4-21.5-3-28 and IC § 4-21.5-3-29] apply to an order granting summary judgment that disposes of all issues in a proceeding.

26. Trial Rule 56 of the Indiana Rules of Trial Procedure provides:

> (A) For claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of twenty [20] days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.
> (B) For defending party--When motion not required. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof. When any party has moved for summary judgment, the court may grant summary judgment for any other party upon the issues raised by the motion although no motion for summary judgment is filed by such party.
> (C) Motion and proceedings thereon. The motion and any supporting affidavits shall be served in accordance with the provisions of Rule 5. An adverse party shall have thirty (30) days after service of the motion to serve a response and any opposing affidavits. The court may conduct a hearing on the motion. However, upon motion of any party made no later than ten (10) days after the response was filed or was due, the court shall conduct a hearing on the motion which shall be held not less than ten (10) days after the time for filing the response. At the time of filing the motion or response, a party shall designate to the court all parts of pleadings, depositions, answers to interrogatories, admissions, matters of judicial notice, and any other matters on which it relies for purposes of the motion. A party opposing the motion shall also designate to the court each material issue of fact which that party asserts precludes entry of summary judgment and the evidence relevant thereto. The judgment sought shall be rendered forthwith if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment may be rendered upon less than all the issues or claims, including without limitation the issue of liability or damages alone although there is a genuine issue as to damages or liability as the case may be. A summary judgment upon less than all the issues involved in a claim or with respect to less than all the claims or parties shall be interlocutory unless the court in writing expressly determines that there is no just reason for delay and in writing expressly directs entry of judgment as to less than all the issues, claims or parties. The court shall designate the issues or claims upon which it finds no genuine issue as to any material facts. Summary judgment shall not be granted as of course because the opposing party fails to offer opposing affidavits or evidence, but the court shall make its determination from the evidentiary matter designated to the court.
> (D) Case not fully adjudicated on motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.
> (E) Form of affidavits--Further testimony--Defense required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies not previously self-authenticated of all papers or parts thereof referred to in an affidavit

shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him. Denial of summary judgment may be challenged by a motion to correct errors after a final judgment or order is entered.

(F) When affidavits are unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(G) Affidavits made in bad faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

(H) Appeal-Reversal. No judgment rendered on the motion shall be reversed on the ground that there is a genuine issue of material fact unless the material fact and the evidence relevant thereto shall have been specifically designated to the trial court.

(I) Alteration of Time. For cause found, the Court may alter any time limit set forth in this rule upon motion made within the applicable time limit.

27. "The purpose of summary judgment is to terminate litigation about which there can be no factual dispute and which may be determined as a matter of law." *Wells v. Hickman*, 657 N.E.2d 172, 175 (Ind. App. 1995).

28. Summary judgment should be granted if the evidentiary material shows there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Auto-Owners Insurance Co. v. United Farm Bureau Insurance Co.*, 560 N.E.2d 459 (Ind. App. 1990).

29. "A fact is 'material' for summary judgment purposes if it helps to prove or disprove an essential element of the plaintiff's cause of action." *Graham v. Vasil Management Co., Inc.* 618 N.E.2d 1349 (Ind. App. 1993). "A factual issue is 'genuine' for purposes of summary judgment if the trier of fact is required to resolve an opposing party's different versions of the underlying facts." *York v. Union Carbide Corp.*, 586 N.E.2d 861 (Ind. App. 1992).

30. In the administrative context, a party moving for summary judgment has the burden of proof with respect to summary judgment, regardless of whether the party would have the burden in an evidentiary hearing. *Regina Bieda v. B & R Development and DNR*, 9 Caddnar 1 (2001). See, also, *Jarboe v. Landmark Community Newspapers*, 644 N.E.2d 118, 123 (Ind. 1994).

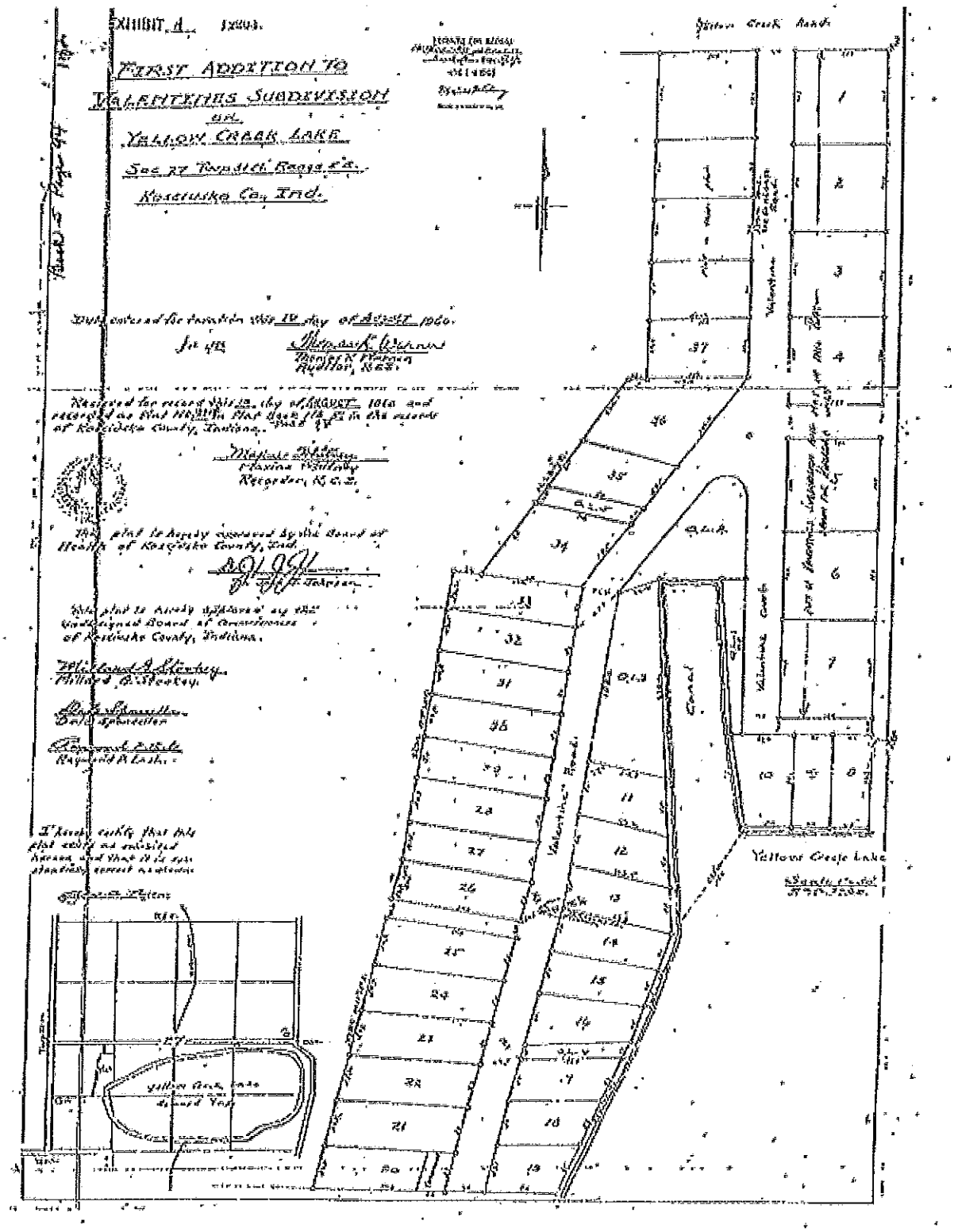
31. Once the party moving for summary judgment establishes a lack of material fact, the party responding to the motion must disgorge sufficient facts to show the existence of a genuine triable issue. *Cowe by Cowe v. Forum Groups, Inc.* 575 N.E.2d 630, 633 (Ind. 1991).

32. The period for filing any motion or document under Finding 20 has expired, and the matter is ripe for disposition.

C. Undisputed Facts

33. The Claimants, the Respondent Intervenors, and the Third Party Respondents own lots in either the First Addition or the Third Addition of Valentine's Subdivision on Yellow Creek Lake.

34. On August 10, 1960, the First Addition to Valentine's Subdivision on Yellow Creek Lake Plat (the "First Addition Plat") was recorded with the Kosciusko County Recorder. A true and accurate copy of the First Addition Plat was attached to the "Claimants' Motion for Summary Judgment" as Exhibit A and is reproduced as follows:



35. When the First Addition Plat was recorded, Otto B. Valentine and Nellie B. Valentine were the owners of the land described in the plat.

36. The First Addition Plat contains Lot 1 through Lot 37, as well as Outlot 1 through Outlot 5. The Outlots are designated on the plat as "O.L.1" through "O.L.5".

37. The First Addition Plat included restrictive covenants. The restrictive covenants ran with the land, were binding on owners in the First Addition Plat for the benefit of all future owners, and were designed for the purposes of keeping the plat desirable, uniform, and suitable for use as a restricted lake par, a place for summer residence, and a resort area. The covenants contained building restrictions, maintenance terms, and limitations to usage for residential purposes.

38. Outlot 1 through Outlot 3 were located at the northern end of a canal. The First Addition Plat provided that "Ground at head of canal is for use of all lot owners in Valentine Plats."

39. Outlot 4 is located between Lot 16 and Lot 17 and is 15 feet wide at the shoreline on Yellow Creek Lake. Outlot 5 is located between Lot 34 and Lot 35 and is 20 feet wide adjacent to Valentine Road. The First Addition Plat does not specify a usage for Outlot 4 or Outlot 5.

40. On August 5, 1965, Otto B. Valentine and Nellie B. Valentine recorded with the Kosciusko County Recorder the Third Addition to Valentine's Subdivision on Yellow Creek Lake (the "Third Addition Plat") containing Lot 38 through Lot 61. The plat provided that "The same restrictions shall apply to this plat as apply to the other Additions of the plat of Valentines Subdivision on Yellow Creek Lake."

41. On October 4, 1960, Otto B. Valentine and Nellie B. Valentine conveyed Lot 21 in the First Addition Plat to Everett V. Lawson (the "1960 Warranty Deed"). The 1960 Warranty Deed described the conveyance as follows:

> Lot Number Twenty-One (21) in the [First Addition Plat], together with the right running with said above described lot as the dominant tenement to use as a private easement of way Outlot Number Four (4) in said [First Addition Plat] for pier, landing and bathing beach facilities, the private easement and right of use hereby granted to be in common with others and not to be exclusive, but to be enjoyed by the grantees, their families and guests, and their heirs and assigns, in common with the grantors and other licensees of the grantors.

42. The Howards own Lot 21.

43. Following the death of Otto B. Valentine, Nellie B. Valentine conveyed several tracts of real estate in Valentine's Subdivision, including Outlot 4 of the First Addition Plat, to James Groves and Reta Groves by Warranty Deed recorded on March 17, 1972 (the "1972 Warranty Deed"). The 1972 Warranty Deed provided in pertinent parts as follows:

> This indenture Witnesseth, That Nellie B. Valentine, sole and unmarried, being over the age of twenty-one (21) years, of Kosciusko County, in the State of Indiana, Convey and Warrant to James Groves and Reta Groves, husband and wife, as tenants by the entireties, of Kosciusko County, in the State of Indiana, for and in consideration of the sum of One Dollar ($1.00) and other good and valuable consideration, the receipt of which is hereby acknowledged, the following described Real Estate in Kosciusko County, Indiana, in the State of Indiana, to-wit:
>
> TRACT I: Out Lots Numbered 1, 2, 3, 4 and 5 in [the First Addition Plat].
>
> TRACT II: Lots Numbered 39, 40, 41, 42 and 43 in Second Addition to Valentines Subdivision on Yellow Creek Lake....
>
> TRACT III: Lots 49, 50, 51, 52, 53, 58, 59, 60 and 61 in [the Third Addition Plat].
>
> This conveyance is made subject to all effective legal restrictions of record. Tract I is conveyed subject to the rights (which are hereby created) of the owners of any lot in any plat or subdivision which was executed by the grantor herein and her now deceased husband, Otto B. Valentine, to use the lots conveyed under Tract I for the purpose of ingress and egress to the water channels and/or the lake, said right to use said lots includes the right to use same for boating and swimming purposes in addition to ingress and egress purposes.

44. On September 1, 2009, James Groves and Reta Groves conveyed the interest in Outlot 4 described in the 1972 Warranty Deed to Paul Smith and Gail Smith. The Smiths also own Lot 16 and Lot 23 in the First Addition Plat.

45. Chad D. Larsh is purchasing the real estate described in Finding 44 from Paul Smith and Gail Smith through a land contract.

46. Lee E. Gross owns Lot 17 and Lot 18 in the First Addition Plat.

47. Daniel Jones and Jennifer Jones own Lot 19 in the First Addition Plat.

48. Thomas Warren and Diana Warren own Lot 61 in the Third Addition Plat.

D. Disposition of DNR's Assertion that the Howards' Notice to Affected Persons was Deficient

49. As referenced in Finding 4, the first of two stated reasons why the DNR denied the subject permit was for the Howards' failure to notify at least one of the owners of each parcel of real property reasonably known to be adjacent to the affected real property as required by IC § 14-11-4-5.

50. A proceeding before a Commission administrative law judge under AOPA is conducted de novo. IC § 4-21.5-3-14(d) and *DNR v. United Refuse Co., Inc.*, 615 N.E.2d 100 (Ind. 1993).

51. The Respondent Intervenors have participated fully in the proceeding. With the substantial efforts by the Howards to join the Third Party Respondents, and the participation or acquiescence by the DNR and the Respondent Intervenors in those efforts, the Howards have addressed sufficiently any deficiency of notice to potentially affected persons. See particularly Finding 10 and Finding 11.

52. The efforts described in Finding 51 also address DNR's stated reason for denial that the Howards failed to notify other lot owners in Valentine's Subdivision that might have shared access rights with the Howards.

53. Any failure by the Howards to notify affected persons is cured.

E. Disposition of DNR's Assertion that Howards Failed to Prove Access to the Easement on Outlet 4 is Exclusive and Not Shared

54. As referenced in Finding 4, the second of two stated reasons why the DNR denied the subject permit was the Howards failure to prove access to the easement on Outlet 4 was exclusive and not shared.[b]

55. The Howards and the Respondent Intervenors agree this proceeding involves the interpretation of two easements affecting Outlot 4 in the First Addition Plat. These are the 1960 Warranty Deed identified in Finding 41 and the 1972 Warranty Deed set forth in Finding 43.

56. Principles applicable to the interpretation of easements in the context of riparian rights were summarized in *Parkison v. McCue*, 831 N.E.2d 118, 128 (Ind. App. 2005):

> Easements burdening land with riparian rights attached do not necessarily provide the easement holder use of these riparian rights. *Brown v. Heidersbach*, 172 Ind. App. 434, 441, 360 N.E.2d 614, 619-20 (1977). Instead, we first look to the express language of the easement. *Klotz v. Horn*, 558 N.E.2d 1096, 1097-98 (Ind. 1990). An instrument creating an easement must be construed according to the intention of the parties, as ascertained from all facts and circumstances, and from an examination of all its material parts. *Brown*, 360 N.E.2d at 620. Courts may resort to extrinsic evidence to ascertain the intent of the grantors creating the easement only where the language establishing the easement is ambiguous. *Gunderson v. Rondinelli*, 677 N.E.2d 601-603 (Ind. Ct. App. 1997)(citing Klotz, 558 N.E.2d at 1098). A deed is ambiguous if it is susceptible to more than one interpretation and reasonably intelligent persons would honestly differ as to its meaning. See *Abbey Villas Dev. Corp. v. Site Contractors, Inc.*, 716 N.E.2d 91, 100 (Ind. Ct. App. 199), *trans. denied.*

57. The 1960 Warranty Deed granted authority to the owners of Lot 21 for the placement of a "pier" and the use of a "landing" on Outlot 4. The current owners of Lot 21 are the Howards, and they enjoy the dominant estate on Outlot 4 for the placement of a pier and the use of a landing.

58. A principle of statutory construction is that words and phrases shall be taken in their plain, or ordinary and usual sense. IC § 1-1-4-1 and *Indiana State Hwy. Comm'n v. Indiana Civil Rights Comm'n*, 424 N.E.2d 1024 (Ind. App. 1981). A "landing" is a "place where a ship or boat takes on or unloads cargo or passengers." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED,1268 (1976 G. and C. Merriam Company, Publishers). A landing is a "[s]tructure providing a place where boats can land people or goods." U.S. Gazetteer (1991) and WebDictionary.co.uk. *Spaw v. Ashley*, 12 Caddnar 233, 242 (2010).

59. The courts have recognized that a "landing" may exist on realty that is unimproved or improved. "A 'landing' is a bank or wharf to or from which persons may go or to some vessel in the contiguous water...." *State v. Louisiana Terminal Co.*, 179 La. 671, 154 S. 731 (La. 1934). A "landing" is a place on a navigable watercourse, for lading and unlading goods, or for the reception and delivery of passengers. "It is either the bank or wharf to or from which persons may go from or to some vessel in the contiguous waters." *Portland & W.V.R. Co. v. City of Portland*, 14 Or. 188, 12 P. 265 (Or. 1886). A boat landing may be unimproved or improved. A wharf is a type of improved landing. If suitable to the purposes for a public landing, the construction of a wharf on the realty is not inappropriate. *Reighard v. Flinn*, 194 Pa. 352, 44 A. 1080 (Pa. 1900). *Spaw v. Ashley* at 242.

60. A "wharf" is a structure built parallel and contiguous to the shoreline of a body of water and used as a berthing place for boats to unload cargo and passengers. If constructed perpendicular to or at an oblique angle to the shoreline, a "wharf" is considered a "pier". Wester-Mittan, *Glossary of Water Related Terms*, 5 WATERS AND WATER RIGHTS (LexisNexis 2009). To similar effect is *Jansing v. DNR and Hawkins, et al.*, 11 Caddnar 8, 23 (2007): "'Pier' means a long narrow structure extending from the shore into a body of water and used as a landing place for boats or used for recreational purposes. Terms sometimes used synonymously include dock, slip and wharf." *Spaw v. Ashley* at 242.

61. On its face, the 1960 Warranty Deed is unambiguous. The owners of Lot 21 hold "the dominant tenement" for the placement of a pier to accommodate the enjoyment of a boat landing at Outlot 4. As the current owners of Lot 21, the Howards are the beneficiaries of the easement provided by the 1960 Warranty Deed.

62. The 1972 Warranty Deed purported to grant the fee in Outlot 4 to James Groves and Reta Groves. But the 1960 Warranty Deed reserved only a personal license for Otto B. Valentine and Nellie B. Valentine to share these rights during their lifetimes. The Valentines did not retain any assignable riparian rights for themselves or their "heirs and assigns", but rather conveyed "the dominant" riparian rights to only the owners of Lot 21 and "their heirs and assigns". With respect to Outlot 4, Nellie B. Valentine had no interest to convey in the 1972 Warranty Deed. Any riparian rights associated with Outlot 4 are subject to "the dominant" rights conveyed by the 1960 Warranty Deed and now enjoyed by the Howards.

63. Both the 1960 Warranty Deed and the 1972 Warranty Deed were conditional. The rights conveyed by the 1960 Warranty Deed were "to be enjoyed by the grantees [now the Howards], their families and guests, and their heirs and assigns, in common with the grantors [Otto B. Valentine and Nellie B. Valentine] and other licensees of the grantors." The rights conveyed in the 1972 Warranty Deed were "made subject to all effective legal restrictions of record. Tract I is conveyed subject to the rights (which are hereby created) of the owners of any lot in any plat or subdivision which was executed by the grantor herein and her now deceased husband, Otto B. Valentine, to use the lots conveyed under Tract I for the purpose of ingress and egress to the water channels and/or the lake, said right to use said lots includes the right to use same for boating and swimming purposes in addition to ingress and egress purposes." With respect to Outlot 4, "the dominant tenement" had been granted by the 1960 Warranty Deed to the owners of Lot 21.

64. The Howards enjoy the dominant estate in Outlot 4. The riparian rights of the owners of Outlot 4 are subject to the vested and dominant riparian rights of the Howards as the owners of Lot 21.

F. Remand to DNR for Determination of the Subject Permit

65. The DNR is obliged to investigate and evaluate a permit application fully to assure compliance with the Lakes Preservation Act and 312 IAC § 11. IC § 14-26-2-5, IC § 14-26-2-23(c), and 312 IAC § 11-1-2.

66. The DNR is authorized to make initial permitting determinations under the Lakes Preservation Act. The DNR employs professionals with expertise to formulate these determinations. Illustrative is *DNR v. Freeman Orchard Assoc., Inc.*, 11 Caddnar 285 (2008) where for consideration was pier placement and boating safety.

67. The DNR properly denied the application for the subject permit because the Howards' notice to potentially affected persons was deficient.

68. The Commission has held consistently that if compliance with the notice requirements of IC § 14-11-4 are fundamentally flawed, "the appropriate remedy is to remand the proceeding to the [DNR] and to order correction of the licensing process." *Island Prop. Owners Ass'n., Inc. v. Clemens and DNR*, 12 Caddnar 56, 63 (2009) citing *Wheeler, et al. v. Peabody, DNR, and Town of Zionsville (Intervenor)*, 9 Caddnar 193, 195 (2004).

69. The defective notice was cured in the course of this proceeding. The effort to accomplish the cure was substantial. Before the cure was accomplished, notice efforts were fundamentally flawed.

70. In addition, the motions for summary judgment have identified riparian ownership and an easement that authorizes the placement of a pier to accommodate a boat landing at the site where the subject permit would be exercised.

71. Before potentially affected persons were notified, and the riparian ownership and easement were identified, the DNR did not have a sufficient foundation to investigate and evaluate the substantive matters pertaining to the subject permit.

72. In determining the merits of the application for the subject permit, the DNR is obliged to consider factors that include the interests of a landowner having property rights abutting a public freshwater lake or rights to access a public freshwater lake. IC § 14-26-2-23(c) authorizes the DNR to issue a permit "after investigating the merits of the application." Separately, 312 IAC § 11-1-2(c) states the DNR, before issuing a permit under the Lakes Preservation Act, "shall consider" in pertinent part "[t]he likely impact upon the applicant and other affected persons."

73. Also, as stated by the Court of Appeals of Indiana in *Lake of the Woods v. Ralston*, 748 N.E.2d 396 (Ind. App. 2001), the Lakes Preservation Act is "[p]ublic trust legislation" intended to recognize "the public's right to preserve the natural scenic beauty of our lakes and to recreational values upon the lakes." The Court further observed "Riparian landowners...continue to possess their rights with respect to a public freshwater lake, but their rights are now statutory and must be balanced with the public's rights."

74. Now and only now the DNR has a sufficient foundation to effectively investigate and evaluate the application for the subject permit under the Lakes Preservation Act and 312 IAC § 11. The matter should be remanded to the DNR for a permitting determination consistent with summary judgment granted for the cured notice to potentially affected persons, and consistent with the identification of riparian interests, as previously set forth.

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[a] See, also, "Listing of Public Freshwater Lakes", Natural Resources Commission, Information Bulletin #61 (Second Amendment), 20110601-IR-312110313NRA (June 1, 2011), p. 4.

[b] The second reason also identified alleged notice deficiencies. These were cured as referenced in Finding 51 and Finding 52.

[FINAL ORDER]

(1) Summary judgment is granted upon the following matters pertaining to the DNR's assertion that the Howards application for the subject permit should be denied.

(A) The Howards failed to notify at least one of the owners of each parcel of real property reasonably known to be adjacent to the affected real property as required by IC § 14-11-4-5. With respect to this assertion, any failure to provide notification was cured by notification performed in this proceeding. Similarly, the DNR's assertion of the Howards' failure to notify other lot owners in Valentine's Subdivision, that might have shared access rights with the Howards, was also cured.

(B) The Howards failed to prove access to the easement on Outlot 4 in the First Addition to Valentines Subdivision on Yellow Creek Lake, and within Yellow Creek Lake in Kosciusko County, Indiana, was exclusive and not shared with other persons. With respect to this assertion, there is no material issue of fact in dispute as to proprietary interests. The Howards enjoy "the dominant" estate in Outlot 4. Among other benefits, the dominant estate authorizes the placement of a pier to accommodate a boat landing.

(2) Summary judgment is not granted as to the performance by the DNR of its permitting functions under the Lakes Preservation Act and 312 IAC § 11. The Howards' notice to potentially affected persons was deficient until cured by this proceeding. Until the entry of this Order, the DNR had not determined and could not reasonably have determined the interests of persons claiming riparian ownership or an easement based on the riparian ownership of another person. As a result, the DNR could not have investigated and evaluated fully the application for the subject permit to assure compliance with the Lakes Preservation Act and 312 IAC § 11. The proceeding is remanded to the DNR with instructions to complete an investigation and evaluation, and to issue a determination, with respect to the Howards' application for the subject permit, that is consistent with the terms of this Order. The DNR shall provide notice of its determination to the Howards and the Respondent Intervenors' or to their respective attorneys.

[2] On May 16, 2013, the Department of Natural Resources (the "DNR") issued a permit (the "subject permit") to Larry J. Howard and Bernadean M. Howard (the "Howards") to place a pier from Outlot 4 into Yellow Creek Lake. The DNR's Division of Water described the subject permit as "CTS-3553—PL-21572" which provided in pertinent parts as follows:

> This is in response to a proposed temporary individual pier on Yellow Creek Lake, originally reviewed by the [DNR] under Permit Application No. PL-21572. According to the information submitted, a 3' wide temporary individual pier will be placed in the middle of a 15' wide easement. The wooden pier will be 38' long and will be supported by auger poles. The last 16' of the pier will be set at a lower elevation than the remainder of the pier to allow for the docking of an 8' wide pontoon boat, which will straddle the lower pier section. Details of the project are contained in information and plans received at the Division of Water on July 12, 2010, September 27, 2010 and May 13, 2013. The proposed pier will be placed on Outlot 4, Valentine Subdivision 1st Addition; between 8730 and 8746 South Valentine road, in Section 27, Township 31 North, Range 5E, near Claypool, Seward Township, Kosciusko County.
>
> The above reverenced permit application was denied on November 24, 2010 due to the following reasons:
>
> > 1) failure to notify at least one (1) of the owners of each parcel of real property reasonably known to be adjacent to the affected real property as required by IC 14-11-4-5

2) failure to prove that access to the easement on Outlot 4 is exclusive and not shared; if access rights are shared with other lot owners in Valentine's Subdivision, then those lot owners should have been provided public notice as well.

The denial was subsequently appealed on December 2, 2010 when you petitioned for administrative review under the Administrative Orders and Procedures Act.... As a result of the administrative proceedings, a Final Order of Partial Summary Judgment with Findings...was issued by the AOPA Committee of the...Commission on March 29, 2012.... The Commission's AOPA Committee is the agency's ultimate authority and the action is its final determination.

According to this Order, Denial Reason #1 was "cured" by the notification performed under the administrative proceeding. Additionally, the Order found that with respect to Denial Reason #2, "the Howards enjoy 'the dominant' estate in Outlot 4 [and]...the dominant estate authorizes the placement of a pier to accommodate a boat landing." The Order remanded the [Howards'] proposal back to the [DNR] to issue a determination that is consistent with the terms of the Order.

Therefore, the proposal has been re-examined by the [DNR] and staff have determined that if the project is followed as described in the submitted information, it is approved if the "General Conditions"...and the following Special Conditions are met:

1. minimize the movement of resuspended bottom sediment from the immediate project area
2. revegetate all bare and disturbed areas landward of the shoreline with a mixture of grasses (excluding all varieties of tall fescue) and legumes as soon as possible upon completion
3. minimize any impacts to the emergent vegetation bed associated with the project site
4. place the pier in conformance with the attached sketch; the pier shall extend no more than 38 feet from the legal shoreline
5. install and remove the pier by and or use small tools; no heavy machinery
6. support the pier by auger poles or other small diameter polies resting on the lake bottom, the poles must be 3.5 inches or less in diameter, the poles must not be mounted in or comprised in concrete or cement
7. do not extend any pier segments in a perpendicular direction from the pier, do not attach any platforms to the sides of the pier
8. no portion of the boat or pier may extend beyond the riparian zone of Outlot 4
9. obtain prior written approval from the [DNR] for any proposed changes to the pier configuration, or any additional construction lakeward of the shoreline beyond the scope of this project

This letter should be displayed at the project site. The Division of water will place a copy of this letter in the file to be retained as a permanent record....

[3] On May 29, 2013, Chad D. Larsh, Michelle M. Larsh and Marvin D. Larsh (collectively the "Larshes") filed a "Petition for Administrative Review" of the subject permit to initiate this proceeding.

[4] On May 31, 2013 an "Amended Petition for Administrative Review" was filed by the Larshes and Lee E. Gross, Trustee of the Lee E. Gross Revocable Trust (collectively the "Claimants"). The Claimants, the Howards, and the DNR are collectively the "parties".

[5] An administrative law judge was appointed by the Commission under IC § 14-10-2-2 to conduct this proceeding, and he scheduled the initial prehearing conference for July 8, 2013.

[6] During the initial prehearing conference, the parties agreed to a schedule to file and serve motions for summary judgment. Following extensions of time that were agreed by the parties and then ordered by the administrative law judge, the following filings were made timely:

> (A) On January 8, 2014, the Respondents', Larry J. Howard and Bernadean M. Howard's, Motion for Summary Judgment; Respondents', Larry J. Howard and Bernadean M. Howard's Brief in Support of Motion for Summary Judgment; James J. Hebenstreit's Affidavit in Support of Respondents' Larry J. Howard and Bernadean M. Howard's Motion for Summary Judgment; and supporting exhibits were filed.
>
> (B) On February 28, 2014, the Claimants' Brief in Opposition to Respondent Howards' Motion for Summary Judgment; Claimants' Designation of Evidence; and Designation of Material Issues of Fact were filed.
>
> (C) On March 21, 2014, Respondents', Larry J. Howard and Bernadean M. Howard's, Reply Brief in Support of Motion for Summary Judgment was filed.
>
> (D) The DNR made no filing with respect to summary judgment.

[7] The proceeding is ripe for a disposition of the summary judgment motions. The standards for summary judgment referenced in Finding 25 through Finding 31 of *Howard v. DNR* also apply here.

[8] Matters that may present material issues of fact are the three items identified in the Claimants' Designation of Material Issues of Fact and by the three items the Howards identified in their summary judgment. These are considered infra.

[9] The Claimants' first item is whether "the failure to provide notice to adjacent owners or interested parties of the consideration by the [DNR] of [the Howards] is a flaw fatal to the issuance of the [subject] permit."

[10] Defective notice to affected persons was an issue in *Howard v. DNR*, and the Commission ruled in Part (1)(A) of the Final Order that the subsequent administrative review cured any defect. As part of the remand, the Commission ordered the DNR to give notice of a resulting permit to the Howards and the Intervenors or to their respective attorneys. The DNR provided notice of the subject permit "to the service list created in the PL-21572, as well as the attorneys of record". Affidavit of James J. Hebenstreit (January 8, 2014) [Hebenstreit Affidavit], ¶ 14. The Claimants cite in support IC § 14-11-4-5. For consideration is not a new permitting action, however, but rather remand of the permit at issue in *Howard v. DNR*. The Claimants have made no showing IC § 14-11-4-5 should be applied as an element for a permit review on remand. Even if the Commission erred in not requiring new notice under IC § 14-11-4-5 on remand, the Claimants were obliged to pursue and prevail in correcting any error on judicial review. DNR provided notice of issuance of the subject permit consistently with the Final Order. There is no issue of material fact. The notice provided by the DNR was consistent with the Final Order and appropriate.

[11] The Claimants' second item is whether "the evaluations provided by the various divisions of the [DNR], of the application of [the Howards for the subject permit], failed to properly consider the actual extent of emergent vegetation/wetlands adjacent to the riparian area of" the Howards.

[12] "On October 12, 2010, Nathan D. Thomas, a biologist with the Division of Fish and Wildlife Environmental Unit, conducted an inspection on the Howards' pier application. As a result of his inspection, Mr. Thomas reported" an "assessment and recommended guidance" with respect to the application. Hebenstreit Affidavit, ¶ 4. Thomas had reported with respect to his inspection:

> Fish and Wildlife Resource Information
> The proposed project site is located on the west end of Yellow Creek Lake within the Valentine Subdivision. The proposed pier has already been installed, and aerial photos suggest [it] has been present for some time. The pier itself is 22 ft. long, terminating with a pontoon (16') moored perpendicular to the shoreline. Total length of the pier and pontoon is approximately 38 ft. Water depth at the end of the pier was approximately 18 in.
>
> The shoreline in the immediate vicinity of the project site is characterized by timbers faced with glacial stone. A large bed of emergent vegetation (white water lily) is located approximately 10 ft. lakeward of the shoreline, extending up to another 130 ft. lakeward, and running along 137 linear ft. of shoreline. Aerial photos suggest this bed is great than 2,500 sq. ft. (>14,000 sq ft) and should be considered a significant wetland. Though

abutted to the proposed/present pier, boating channels have been established around the emergent vegetation.

Eurasian watermilfoil was observed within the vicinity of the pier and was notably dense in areas between the shoreline and shoreward edged of the emergent vegetation. No fish were observed during the site visit. Bottom substrate near the project site is primarily sand and gravel.

Finally, a small pier is located adjacent to the proposed pier where a small rowboat and swimming raft were moored.

Impact of Proposed Action on Fish and Wildlife Resources
The installation of the 22 ft. pier, with inclusion of the 16 ft pontoon boat will have minimal impacts on the fish, wildlife, or botanical resources of Yellow Creek Lake. The pier appears to have been present for a few years (installation date unknown at time of review) and any impacts to the significant wetland have already occurred. Boating lanes have been established and allow for navigation around the bed with minimal disturbance....

Recommendation
Pursuant [to] IC 14-26-2-23, the Division of Fish and Wildlife recommends approval of PL-21572 with the following conditions:

...Minimize any impacts to the emergent vegetation bed associated with the project site.

[13] The subject permit includes conditions consistent with the recommendations of DNR's Division of Fish and Wildlife. See particularly Special Condition 3 set forth in Finding ***[2]***.

[14] The undated Affidavit of Chad D. Larsh (the "Larsh Affidavit") is offered in support of the Claimants' assertion the DNR failed to properly consider the actual extent of emergent vegetation/wetlands adjacent to the Howard's riparian area:

3. Attached as Exhibits A, B and C are aerial photographs of the emergent vegetation immediately adjacent to the lakeside of Outlot 4.... The photographs accurately depict the emergent vegetation as it existed in the Summer of 2013.
4. Any pier placed on the lakeward end of Outlot 4, extending 38 feet into the water of Yellow Creek Lake will, of necessity, disturb the emergent vegetation and existing wetland.
5. The photographs attached [as] Exhibits B and E[,][1] and apparently utilized by the DNR in consideration of the application of Howards, do not accurately depict the normal state of the emergent vegetation immediately adjacent to the Howard pier.

[15] The Larsh Affidavit fails to identify a question of fact that is either genuine or material.

[1] The administrative law judge was unable to locate an attachment to the Larsh Affidavit marked "Exhibit E".

[16] First, the Larsh Affidavit concludes any pier lakeward "of Outlot 4, extending 38 feet into the water of Yellow Creek Lake will, of necessity, disturb the emergent vegetation and existing wetland." The conclusion is a truism but does not offer a measure applicable to licensure under 312 IAC § 11. The regulatory standard is not whether any environmental harm results from an activity but whether "significant environmental harm" results. 312 IAC § 11-3-3(d)(1). *Kinder v. Department of Natural Resources*, 8 Caddnar 23, 24 (1998).

[17] "Significant environmental harm" is defined at 312 IAC § 11-2-23 to include damage to natural resources "the individual or cumulative effect of which is found by the [DNR] director or a delegate to be obvious and measurable (based upon the opinion of a professional qualified to assess the damage)." The Larsh Affidant does not assert, much less demonstrate, that the placement of the pier authorized by the subject permit would cause significant environmental harm. Neither does the Larsh Affidavit provide a basis to find that Larsh is a professional qualified to assess the damage to emergent vegetation or a wetland.

[18] Second, the Larsh Affidavit concludes the DNR "apparently utilized" aerial photographs to evaluate the Howards' permit application. No foundation is provided for the conclusion, and it is inconsistent with facts set forth in the Hebenstreit Affidavit. Hebenstreit indicated the DNR used a report prepared by Nathan D. Thomas, a biologist for the DNR's Division of Fish and Wildlife Environmental Unit. The Thomas report was based on an onsite inspection that he performed on October 12, 2010. The subject permit includes conditions identified by Thomas to minimize impacts to emergent vegetation within the project site.

[19] The ultimate facts are that Nathan Thomas, a biologist qualified to assess the damage, made a site view and determined granting a permit would not cause significant environmental harm if conditioned to minimize impacts to emergent vegetation within the project site. The Claimants have presented no facts that are in material dispute.

[20] The other parties are entitled to summary judgment in their favor and against the Claimants with respect to the second item asserted by the Claimants.

[21] The Claimants' third item is whether the DNR failed to properly consider the effect of the subject permit "on the use of the landward portion of Outlot 4 owned by Chad D. Larsh et al."

This item presents issues that are interwoven with the Howards' second item and third item which are as follows:

> 2. The Larshes had actual notice of the DNR's consideration of the [subject permit] application on remand and had ample time to submit additional information but failed to do so thereby waiving any objection to the [subject permit], and in any event the DNR provided notice as required in the Final Order and satisfied its duties in reviewing the application; and
> 3. The Larshes' allegation that the [subject permit] unreasonably burdens the Larshes' rights as titleholder of Outlook 4 is a collateral attack on the Final Order.

These items are considered together.

[22] As reflected in Finding ***[10]***, the DNR provided proper notice to the Claimants on remand.

[23] The Howards misconstrue the Final Order in *Howard v. DNR*. The Commission did not grant summary judgment with respect to the correlative riparian rights of the Howards' neighbors or the servient estate on Outlot 4. To the contrary, the Commission determined that only with the extensive curative initiatives in *Howard v. DNR* was the DNR even capable of evaluating riparian rights: As set forth in Finding ***[1]***:

> 71. Before potentially affected persons were notified, and the riparian ownership and easement were identified, the DNR did not have a sufficient foundation to investigate and evaluate the substantive matters pertaining to the subject permit.
>
> 72. In determining the merits of the application for the subject permit, the DNR is obliged to consider factors that include the interests of a landowner having property rights abutting a public freshwater lake or rights to access a public freshwater lake. IC § 14-26-2-23(c) authorizes the DNR to issue a permit "after investigating the merits of the application." Separately, 312 IAC § 11-1-2(c) states the DNR, before issuing a permit under the Lakes Preservation Act, "shall consider" in pertinent part "[t]he likely impact upon the applicant and other affected persons."
>
> ....
>
> 74. Now and only now the DNR has a sufficient foundation to effectively investigate and evaluate the application for the subject permit under the Lakes Preservation Act and 312 IAC § 11. The matter should be remanded to the DNR for a permitting determination consistent with summary judgment granted for the cured notice to potentially affected persons, and consistent with the identification of riparian interests, as previously set forth.
>
> **[FINAL ORDER]**
>
> (1) Summary judgment is granted upon the following matters pertaining to the DNR's assertion that the Howards application for the subject permit should be denied.
>
> (A) The Howards failed to notify at least one of the owners of each parcel of real property reasonably known to be adjacent to the affected real property as required by IC § 14-11-4-5. With respect to this assertion, any failure to provide notification was cured by notification performed in this

proceeding. Similarly, the DNR's assertion of the Howards' failure to notify other lot owners in Valentine's Subdivision, that might have shared access rights with the Howards, was also cured.

(B) The Howards failed to prove access to the easement on Outlot 4 in the First Addition to Valentines Subdivision on Yellow Creek Lake, and within Yellow Creek Lake in Kosciusko County, Indiana, was exclusive and not shared with other persons. With respect to this assertion, there is no material issue of fact in dispute as to proprietary interests. The Howards enjoy "the dominant" estate in Outlot 4. Among other benefits, the dominant estate authorizes the placement of a pier to accommodate a boat landing.

(2) Summary judgment is not granted as to the performance by the DNR of its permitting functions under the Lakes Preservation Act and 312 IAC § 11. The Howards' notice to potentially affected persons was deficient until cured by this proceeding. Until the entry of this Order, the DNR had not determined and could not reasonably have determined the interests of persons claiming riparian ownership or an easement based on the riparian ownership of another person. As a result, the DNR could not have investigated and evaluated fully the application for the subject permit to assure compliance with the Lakes Preservation Act and 312 IAC § 11. The proceeding is remanded to the DNR with instructions to complete an investigation and evaluation, and to issue a determination, with respect to the Howards' application for the subject permit, that is consistent with the terms of this Order....

[24] The Commission in *Howard v. DNR* ruled the Howards enjoy the dominant estate with respect to Outlot 4, and the dominant estate authorized the placement of a pier to accommodate a boat landing. The Commission did not rule the Howards' interests superseded those of their neighbors or superseded the interests of the servient estate to Outlot 4. Indeed, the Commission ruled the DNR could not have previously evaluated those interests, and a purpose on remand was to accomplish the evaluation.

[25] The Claimants describe ownership in the "Amended Petition for Administrative Review" of Lot 16, Lot 17, and Lot 18, and the Larshes enjoy the servient estate for Outlot 4. The DNR is "responsible for implementing the statutory process of issuing permits for piers on public freshwater lakes." Facts which must be considered include the interests of landowners who abut the lake. IC § 14-26-2-23(c)(5) and (e)(2). *Kranz v. Meyers Subdivision Prop. Owners*, 969 N.E.2d 1068, 1078 (Ind. App. 2012). On remand, the subject permit must properly address the Claimants' interests. The Hebenstreit Affidavit does not reference DNR consideration of the riparian interests of the Claimants, and the Howards offer no material facts upon which to conclude the DNR considered proprietary interests.

[26] Even if the DNR had considered the proprietary interests of the Howards and the Claimants, an administrative law judge for the Commission is obliged to conduct a de novo hearing on administrative review. *Indiana DNR v. United Refuse Co.*, 615 N.E.2d 100 (Ind. 1993) and IC §

4-21.5-3-14(d). The Commission is the "ultimate authority" for the DNR. IC § 14-10-2-3. Rather than deferring to a DNR permitting determination, de novo review requires an administrative law judge to consider and apply the proper weight of the evidence. "The de novo hearing is conducted by the Commission's administrative law judge. 'The hearing is not a DNR proceeding, and the Commission is not governed by the action of the DNR.'" *Collins & Costanza v. Town of Ogen Dunes*, 13 Caddnar 269, 273 (2014) citing *Island Prop. Owners Ass'n, Inc. v. Clemens and DNR*, 12 Caddnar 56, 58 (2009). A party does not waive the opportunity for Commission administrative review by making or declining to make a particular argument to the DNR prior to its permitting action. The opportunity for administrative review does not require a party's prescience for what the DNR will or will not consider.

[27] At each stage of a proceeding, the person or persons requesting an agency take action has or have the burden of going forward and the burden of persuasion (sometimes collectively referred to as the "burden of proof"). IC 4-21.5-3-14(c) and *Indiana DNR v. Krantz Bros. Const.*, 581 N.E.2d 935, 938 (Ind. App. 1991). The Claimants have the burden of proof to demonstrate the DNR's Division of Water erred in granting the subject permit. There are material issues of fact as to whether the DNR properly considered (or considered in any respect) the proprietary interests of the Claimants. A hearing of the facts is required to determine the correlative proprietary rights of the Claimants and the Howards.

[28] The Howards first item (and the final item for consideration upon summary judgment) is the contention they are "entitled to a general license for a qualified temporary pier under 312 IAC 11-3-1".

[29] This item fails because for consideration in this proceeding is not a general licensure but rather an individual license (or permit). A general license simply is not at issue.

[30] This item also fails because the Howards are disqualified from a general license by 312 IAC § 11-3-1(b)(2) since the Claimants and the Howards dispute whether the pier authorized by the subject permit would "infringe on the access of an adjacent landowner to the public freshwater lake." A primary purpose of the general license provided by 312 IAC § 11-3-1 is to relieve persons from the substantial notice requirements to affected persons, for insubstantial and

uncontested temporary structures, that would otherwise apply under the Lakes Preservation Act. But the rights of affected persons are not eliminated. *Brown, et al. v. DNR*, 9 Caddnar 109, 114 (2003). To similar effect is *Allen v. LaSalle Application of 312 IAC 11-3-2*, 13 Caddnar 191 (2013).

[31] A person may seek administrative review of a claim of entitlement to a general license under 312 IAC § 11-3-2. The Claimants have done essentially that. The result would be incongruous, and administrative efficiency would be disserved, if the Howards were to be declared qualified for a general license, and the Claimants were then required to initiate a new administrative review to assert their riparian claims. The vast majority of temporary piers in public freshwater lakes exist without notable controversy. The general permit provided in 312 IAC § 11-3-2 accommodates the majority and relieves the DNR from an unproductive burden. For the minority of piers that are in controversy, a general license is unavailable.

NONFINAL ORDER

No facts are in material dispute and a disposition is made with respect to all matters in this proceeding as set forth in this Order, except a hearing of the facts is required to determine the correlative proprietary rights of the Claimants and the Howards. There is no just cause for delay, and this Nonfinal Order should be made a Final Order of the Commission.

Dated: June 10, 2014

Stephen L. Lucas
Administrative Law Judge
Natural Resources Commission
Indiana Government Center North
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Indianapolis, IN 46204-2200

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cc: Lori Schnaith, DNR Division of Water

BEFORE THE
NATURAL RESOURCES COMMISSION
OF THE STATE OF INDIANA

FILED

JUN 27 2014

NATURAL RESOURCES COMMISSION
DIVISION OF HEARINGS

IN THE MATTER OF:	)	
	)	
LEE E. GROSS REVOCABLE TRUST, CHAD D. LARSH, MICHELLE M. LARSH, and MARVIN D. LARSH,	)	
	)	ADMINISTRATIVE CAUSE
Claimants	)	NUMBER: 13-100W
VS.	)	Application CTS-3553-PL-21572
	)	
INDIANA DEPARTMENT OF NATURAL RESOURCES, LARRY J. HOWARD and BERNADEAN M. HOWARD,	)	
	)	
Respondents	)	

RESPONDENT'S OBJECTION TO NONFINAL ORDER OF PARTIAL SUMMARY JUDGMENT ON REMAND

Respondents Larry J. Howard and Bernadean M. Howard ("the Howards"), by counsel, object to the entry of the Nonfinal Order of Partial Summary Judgment on Remand in this matter, and in support thereof would show the Commission as follows:

1. On June 10, 2014, a Nonfinal Order of Partial Summary Judgment on Remand ("Nonfinal Order") was entered by the Honorable Stephen L. Lucas, and the Nonfinal Order was accompanied by a Notice of Entry setting June 30, 2014, as the deadline for filing objections to the Nonfinal Order. The Nonfinal Order found that there were material issues of fact concerning the Howard's pier permit and that a "hearing of facts is required to determine the correlative proprietary rights of the Claimants and the Howards." (Nonfinal Order, p. 19, ¶ 27).

2. On March 29, 2012, the Natural Resources Commission (the "Commission") previously heard this riparian dispute and entered a Final Order of Partial Summary Judgment and Findings (and Remand to the DNR) ("Final Order"), captioned as *In the Matter of Larry J. Howard and Bernadean M. Howard v. Department of Natural Resources*, Administrative Cause Number 10-206W ("*Howard I*"). The dispute involves Howard's placement of a pier on Yellow Creek Lake, lakeward of Outlot 4 in Valentine Subdivision, 1st Addition, between 8730 and 8736 South Valentine Road near Claypool, Seward Township, Kosciusko County ("Outlot 4"). In *Howard I*, the DNR denied the Howards' permit application (Pier Application PL-21572) for only two reasons: (1) the failure to notify all of the affected property owners; and (2) the failure to prove that the Howards' access to the easement on Outlot 4 was exclusive and not shared. The Howard's appealed the DNR's denial to the Commission. First, the Commission ruled that the notice to all applicable property owners was cured by the notification provided in the administrative proceedings. Second, the Commission also ruled that the Howards had an exclusive easement and possessed the dominant riparian rights for Outlot 4, which included the placement of a pier. Upon remand, the DNR then granted the Howards' pier application (Permit #CTS-3553). The Claimants, Chad D. Larsh, Michelle M. Larsh, and Marvin D. Larsh (collectively, "Larshes") appealed the DNR's permit and filed an Amended Petition for Administrative Review.

3. The Nonfinal Order, in part, determined that there are material issues of fact concerning the respective "proprietary rights" of the Larshes and the Howards and found that these rights needed to be adjudicated in order for the Howards to place a pier lakeward of Outlot 4. (Nonfinal Order, ¶¶ 23-27)

4. As previously found in *Howard I*, the Howards own Lot No. 21 in the First Addition to Valentine Subdivision on Yellow Creek Lake. The Howards' predecessors-in-title

were granted their title to Lot No. 21 directly from Otto B. Valentine and Nellie B. Valentine (collectively, "the Valentines"), who platted the subdivision. The Valentines were the owners of both Lot No. 21 and Outlot No. 4 when they executed a Warranty Deed, dated October 4, 1960, which provided as follows:

> Lot Number Twenty-One (21) in the [First Addition Plat], together with the right running with said above described lot as **the dominant tenement** to use as a private easement of way Outlot Number Four (4) in said [First Addition Plat] for **pier, landing and bathing beach facilities**, the private easement and right of use hereby granted to be in common with others and not to be exclusive, but **to be enjoyed by the grantees, their families and guests, and their heirs and assigns, in common with the grantors and other licensees of the grantors**.

(Emphasis added). The Larshes later purchased Outlot 4 "subject to all restrictions of record." The Larshes also purchased Lot No. 16, which is adjacent to Outlot 4 and which has 45 feet of frontage on Yellow Creek Lake. These facts were determined in *Howard I*.

5. Finding Number 24 on page 18 of the Nonfinal Order erroneously states:

> The Commission in *Howard v. DNR* [*Howard I*] ruled the Howards enjoy the dominant estate with respect to Outlot 4, and the dominant estate authorized the placement of a pier to accommodate a boat landing. The Commission did not rule the Howards' interests superseded those of their neighbors or superseded the interests of the servient estate to Outlot 4. Indeed, the Commission ruled the DNR could not have previously evaluated those interests, and a purpose on remand was to accomplish the evaluation.

(Nonfinal Order, ¶ 24, p. 20). Finding No. 24 in the Nonfinal Order is directly contrary to the express language in the Final Order, which found that: "**[T]here is no material issue of fact in dispute as to proprietary interests**. The Howards enjoy 'the dominant' estate in Outlot 4. Among other benefits, the dominant estate authorizes the placement of a pier to accommodate a boat landing." (Final Order, ¶ II(1)(B), p. 18) (emphasis added). The respective "proprietary interests" between the Howards and the Larshes with regard to Outlot 4 were previously

determined by the Commission in *Howard I*, and the matter was remanded back to the DNR "to complete an investigation and evaluation, and to issue a determination . . . that is consistent with the terms of this Order." (Final Order, ¶ II(2), pp. 18-19). The Larshes' appeal of the DNR's subsequent issuance of the Howard's permit, and challenge to the Howard's proprietary rights, is simply a collateral attack on the Final Order. Finding No. 24 of the Nonfinal Order should be clarified or amended to be made consistent with the Final Order in *Howard I* and state that there are no disputed issues of fact regarding Howard's proprietary interests in Outlot 4, and the DNR's pier permit to the Howards for Outlot 4 should be affirmed by the Commission.[1]

6. Findings No. 25 and No. 27 in the Nonfinal Order erroneously state, in part:

> On remand, the subject permit must properly address the Claimants' [Larshes'] interests. The Hebenstreit Affidavit does not reference DNR consideration of the riparian interests of the Claimants, and the Howards offer no material facts upon which to conclude the DNR considered proprietary interests.
>
> There are material issues of fact as to whether the DNR properly considered (or considered in any respect) the proprietary interests of the Claimants [Larshes]. A hearing of the facts is required to determine the correlative proprietary interests of the Claimants [Larshes] and the Howards.

(Nonfinal Order, ¶¶ 25, 27, pp. 20, 21). Again, these findings are inconsistent with the Final Order in *Howard I*, which determined that "there is no material issue of fact in dispute as to proprietary interests." (Final Order, ¶ II(1)(B), p. 18). Findings No. 25 and No. 27 should be amended and clarified to state that there are no material issues of fact in dispute as to the respective proprietary interests of Larshes and the Howards and affirm the issuance of the permit to the Howards to place a pier lakeward of Outlot 4.

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[1] Finding No. 23 should be amended and clarified so that it is consistent with the Commission's Final Order in *Howard I*.

7. The determination by Judge Lucas contained in the Nonfinal Order erroneously states, in part:

> [A] hearing of the facts is required to determine the correlative proprietary rights of the Claimants [Larshes] and the Howards.

(Nonfinal Order, ¶ 27, p. 19). The Nonfinal Order should be amended and clarified that there are no genuine issues of material fact concerning the correlative proprietary rights of the Larshes and the Howards, and the Howards have the proprietary riparian rights to place a pier lakeward of Outlot No. 4.

8. "There is no doubt that the general principle of res judicata and collateral estoppel apply to NRC (Commission) adjudications." *Hoosier Environmental Council* v. *DNR and Foertsch Construction Company, Inc.,* 7 CADDNAR 162 (1997), *referencing South Bend Federation of Teachers* v. *National Education Association South Bend,* 389 N.E.2d 23 (Ind. Ct. App. 1979). Administrative *res judicata* is applicable when a "particular issue is adjudicated and then is put in a subsequent suit on a different cause of action between the same parties or those in privity with them." *South Bend,* 389 N.E.2d at 32. The Larshes, the DNR, and the Howards were all parties to *Howard I.* The Commission's adjudication in *Howard I* clearly confirms that the issue of the Howards' dominant and exclusive riparian rights to Outlot 4 were within the jurisdiction of the Commission. The issue in *Howard I* was that the Larshes and other neighbors wanted to prevent the Howards from placing a pier lakeward of Outlot 4. That is exactly what the Larshes are attempting to do again. The Commission ruled in *Howard I* that there was no disputed, material issue of fact as to the parties' respective proprietary interests. While Judge Lucas stated that the Howards and the DNR "offer no material fact upon which to conclude the DNR considered proprietary interests" (¶ 25, p. 18), there was simply no need to present any such facts because the Commission had already determined the parties' respective proprietary interests: "The

Howards enjoy 'the dominant' estate in Outlot 4. Among other benefits, the dominant estate authorizes the placement of a pier to accommodate a boat landing." (Final Order, p. 18). The Nonfinal Order is inconsistent with the Commission's Final Order in *Howard I*, and Larshes' subsequent challenge to the Howards' riparian rights to Outlot 4 are barred by the doctrine of administrative *res judicata*. The parties should not have to relitigate issues that were already litigated in *Howard I*.

9. Findings No. 23 through 27 of the Nonfinal Order of the Administrative Law Judge should be modified to the extent necessary to confirm the Howard's proprietary and dominant riparian rights to Outlot 4 and that Larshes' servient interests are subject to the Howards' proprietary and dominant right to install a pier lakeward of Outlot No. 4. In all other respects, the Nonfinal Order should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and exact copy of the above and foregoing Objection to Nonfinal Order of Partial Summary Judgment on Remand has been sent electronically this 27th day of June, 2014, to:

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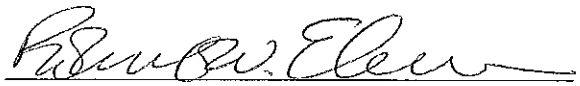

ROBERT W. EHERENMAN

BEFORE THE
NATURAL RESOURCES COMMISSION
OF THE STATE OF INDIANA

IN THE MATTER OF:	)	
	)	
LEE E. GROSS REVOCABLE TRUST, CHAD D. LARSH, MICHELLE M. LARSH and MARVIN D. LARSH, Claimants,	)	ADMINISTRATIVE CAUSE NUMBER: 13-100W
vs.	)	
	)	(CTS-3553 – PL-21572)
INDIANA DEPARTMENT OF NATURAL RESOURCES, LARRY J. HOWARD and BERNADEAN M. HOWARD, Respondents.	)	

RESPONSE TO RESPONDENTS' OBJECTION TO NONFINAL ORDER

Claimants, Lee E. Gross Revocable Trust, Chad D. Larsh, Michelle M. Larsh and Marvin D. Larsh, for response to Respondents' objection to Nonfinal Order of Partial Summary Judgment on Remand would show the Commission:

STATEMENT OF FACTS

In *Howard v. DNR et al.*, 10-206W (Howard I), the Commission determined that "the Howards enjoy "the dominant" estate in Outlot 4. Among other benefits, the dominant estate authorizes the placement of a pier to accommodate a boat landing." However, this Commission also determined that because of improper notice, the DNR "had not determined and could not reasonably have determined the interest of persons claiming riparian ownership or an easement based on the riparian ownership of another person. As a result, the DNR could not have investigated and evaluated fully the application for the subject permit to assure compliance with the Lakes Preservation Act and 312 IAC §11."

As result, the matter was remanded to the DNR which was directed to complete an investigation and evaluation and to issue a determination with respect to the Howards' application for a pier permit.

On remand, the DNR reviewed its prior information and on May 16, 2013, issued a permit to Howards to place a pier at the water's edge of Outlot 4 into Yellow Creek Lake. On May 29, 2013, Chad D. Larsh *et al.* filed a Petition for Administrative Review of the approval of the permit. At the conclusion of proceedings following the filing of a Motion for Summary Judgment by Howards, the Administrative Law Judge determined that there were material issues of fact in dispute concerning the proprietary rights of the Claimants and the Howards and that the DNR, on remand, had failed to address those interests. Further, the Administrative Law Judge determined that even if the DNR had considered the proprietary interest of the parties, on review, an administrative law judge for the Commission is obliged to conduct a *de novo* hearing.

As a result, the Howards' Motion for Summary Judgment was partially granted but denied in regard to a determination of the proprietary rights of the Claimants vis-a-vis the Howards.

The Howards filed their objections to this determination, asking the Commission to reverse the portion of the order on summary judgment which constitutes a denial.

STATEMENT OF ISSUES

1. On remand, did the DNR conduct an investigation to determine the proprietary rights of the Claimants and the Howards.

2. If the DNR conducted an investigation of the proprietary rights of the Claimants and the Howards, was the determination made by the DNR appropriate.

ARGUMENT

In Howard I, this Commission determined, "71. Before potentially affected persons were notified, and the riparian ownership and easement were identified, the DNR did not have a sufficient foundation to investigate and evaluate the substitutive matters pertaining the subject permit." The Commission went on to state, "74. Now and only now the DNR has a sufficient foundation to effectively investigate and evaluate the application for the subject permit under the Lakes Preservation Act and 312 IAC §11. The matter should be remanded to the DNR for a permitting determination consistent with summary judgment granted for the cured notice to

potentially affected persons, and consistent with the identification of riparian interests, as previously set forth." (emphasis added)

This Commission determined in Howard I that no appropriate investigation of the proprietary rights of the Claimants was made in Howard I. With the matter remanded to the DNR to conduct such an investigation, it is only subsequent to the initial determination in Howard I that such an investigation could be completed.

By issuance of the permit on May 16, 2013, the DNR impliedly is assumed to have made such an investigation.

However, at the completion of such investigation, the Claimants are entitled to contest the conclusions reached in such investigation, with that determination ultimately resting with the Administrative Law Judge after a *de novo* hearing.

The objection filed by Howards reaches the improper conclusion that the proprietary rights of abutting property owners (Gross and Larsh) were determined in Howard I when in fact, this Commission concluded in Howard 1 that a remand was necessary to conclude the investigation. There is no issue of *res judicata* or collateral estoppel raised by the Petition for Administrative Review currently pending. Since it was impossible for the DNR to have made a proper investigation at the time of the decision in Howard I, the investigation and resulting decision to issue the permit, having been made after remand, is now subject to review by an administrative law judge.

CONCLUSION

The issuance of the permit by the DNR on May 16, 2013 is subject to review by an administrative law judge upon petition, that determination being made subsequent to the decision in Howard I. The Nonfinal Order of Partial Summary Judgment on Remand issued by Judge Lucas June 10, 2014 should be confirmed and a hearing scheduled on the remaining issue in this matter.

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CERTIFICATE OF SERVICE

The undersigned certifies that on the 18th day of August, 2014, a true and correct copy of the foregoing pleading was served upon the following by first class U.S. mail, postage prepaid:

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